(2)

No. 03-1585

Supreme Court, U.S.
FILED
JUL 26 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FRANCINE M. BOXER, MARSHALL FARNELL and SPOKANE COUNTY,

Petitioners,

v.

CLAUDE COX and LINDA COX,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

PAUL J. BURNS
Counsel of Record

PAUL J. BURNS, P.S.
One Rock Pointe
1212 N. Washington,
Suite 224
Spokane, WA 99201-2400
(509) 327-2213

Attorney for Respondents
Claude Cox
Linda Cox

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the presence of stigmatizing information in a public employees' personnel file is sufficient publication to implicate the liberty interest under the due process clause of the Fourteenth Amendment when state public disclosure law mandates public disclosure of the personnel file upon request?

2. Whether, in light of state law mandating public disclosure of a public employee's personnel file upon request, the law was clearly established that placement of a stigmatizing termination letter in the public employees' personnel file constitutes sufficient publication to implicate the terminated employee's liberty interest?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	5
A. There is No Circuit Split on the Issue Decided by the District Court and the Ninth Circuit	6
B. This Case Does Not Present An Appropriate Occasion for the Court to Consider the Relevance of Extra Circuit Authority to the Qualified Immunity "Clearly Established" Inquiry	10
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 12

Bishop v. Wood, 426 U.S. 341 (1976) 5, 7, 8

Board of Regents v. Roth, 408 U.S. 564 (1972) ... 5, 6, 12, 14

Buxton v. City of Plant City, Florida, 871 F.2d 1037 (11th Cir. 1989) ..... *passim*

Codd v. Velger, 429 U.S. 624 (1977) 7

Copeland v. Philadelphia Police Dept., 840 F.2d 1139 (3rd Cir. 1988) 9

Cox v. Roskelley, 359 F.2d 1105 (9th Cir. 2004) 5, 8, 10, 11

Dawson v. Daly, 120 Wn.2d 782, 845 P.2d 995 (1993) 3, 7, 13

Donato v. Plainview School District, 96 F.3d 623 (2nd Cir. 1996) 8, 9

Hope v. Pelzer, 536 U.S. 730 (2002) 13, 15

Llamas v. Butte Community College District, 238 F.3d 1123 (9th Cir. 2001) 11, 12

Ledford v. Delancey, 612 F.2d 883 (4th Cir. 1980) 8

Mustafa v. Clark County School District, 157 F.3d 1169 (9th Cir. 1998) 11, 12

Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71 (1st Cir. 1990) 9

Saucier v. Katz, 533 U.S. 194 (2001) 13

Wilson v. Layne, 526 U.S. 603 (1999) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. §1983 3

RCW 49.17 ..... 3, 12, 14

STATEMENT OF THE CASE

Respondent, Claude Cox, was formerly employed with Spokane County as the Safety Loss Manager, or Risk Manager. Petitioners, Francine Boxer and Marshall Farnell, are employees of Spokane County. At the time of the events at issue, Ms. Boxer was the County Administrator, and Mr. Farnell was the Director of Administrative Services. Mr. Cox reported directly to Mr. Farnell, who in turn reported to County Administrator Boxer.

This lawsuit arises out of the termination of Mr. Cox's employment with Spokane County in December 1998. Ms. Boxer and Mr. Farnell were individual decision-makers with respect to the termination of Mr. Cox from his employment.

On July 27, 1998, Spokane County incurred substantial liability for damage caused to private automobiles when the County sprayed hot tar during a road-paving project on Bigelow Gulch Road. Mr. Cox was responsible for managing the liability claims against Spokane County arising out of that mishap.

Most of the repairs on the damaged automobiles were performed by Specialty Auto and Truck Painting, Inc. ("Specialty Auto"). In August 1998, Spokane County began to receive complaints that Specialty Auto was overcharging for repairs and charging for repairs it had not made. Petitioner Boxer, and Spokane County Commissioner, John Roskelley, approached Mr. Cox and asked him to look into the problem. The County Commissioners asked the Washington State Auditor to review the Bigelow Gulch claims. On September 29, 1998, in response the State Auditor's report, Petitioners, Boxer and Farnell, placed Mr. Cox on administrative leave with pay pending further

investigation. Spokane County publicly disclosed, via press release, that Mr. Cox had been suspended pending investigation of the Bigelow Gulch incident.

On November 8, 1998, Ms. Boxer and Mr. Farnell wrote Mr. Cox a letter entitled "Notice of Potential Disciplinary Action." This letter summarized four areas of concern detailed in Spokane County's Investigative Report issued on October 30, 1998. The letter allowed Mr. Cox a period of time to respond to the areas of concern. On November 19th, Mr. Cox submitted his response through counsel.

Petitioners were dissatisfied with Mr. Cox's response, and discharged him from his employment by letter dated December 11, 1998. The termination letter articulated two overall reasons for discharging Mr. Cox: (1) failure to meet his responsibilities in conjunction with the processing of claims arising from the Bigelow Gulch incident; and (2) poor management judgment. With respect to the Bigelow Gulch claims, the termination letter alleged overcharging by Specialty Auto and payment to Specialty Auto for work that was never performed. The termination letter discussed four specific examples of the exercise of poor judgment on Mr. Cox's part: (1) calling the supervisor of the individual who alerted County officials to possible overcharging by Specialty Auto; (2) calling the County's insurer to complain about the Claims Manager's criticism of the way the Bigelow Gulch claims were handled; (3) suggesting to his staff that they take their vehicles to Specialty Auto for repair when the owner was Mr. Cox's friend; and (4) engaging in personal business with the owner of Specialty Auto. In its June 15, 2000 Order Granting in Part and Denying in Part the Defendant's Motion for Reconsideration, the District Court observed:

> There is no doubt that these charges, if true, establish extremely poor judgment on Cox's part. . . . but the charges in the letter also arguably implicate his reputation for honesty or morality, as they give the reader the distinct impression that Cox was favoring his friend and trying to keep it quiet.

Mr. Cox's pre-termination suspension had received extensive coverage in the local press. From his suspension in September 1998 to his discharge on December 11, 1998, the entire incident was front-page news in the *Spokesman Review*, Spokane's daily newspaper. On December 14, 1998, Spokane County received a request from a member of the local press for release of Mr. Cox's termination letter. Release of the termination letter was mandated by Washington's Public Disclosure Act, RCW 42.17. Indeed, on December 16, 1998, a Spokane County Deputy Prosecuting Attorney wrote to Mr. Cox's counsel and observed: "I am unaware of any provisions [in the PDA] which would preclude my release of the [termination letter] to [the local press]. It appears that the holding of *Dawson v. Daly* . . . is dispositive of this matter."[1]

Respondent Cox filed this lawsuit on March 17, 1999, alleging causes of action under 42 U.S.C. §1983 for deprivation of property interest, wrongful discharge, and deprivation of his liberty interest in his good name. The District Court granted Petitioner's Summary Judgment

---

[1] The Deputy Prosecutor's reference is to *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995, 1000 (1993) (Stating that a county prosecutor's performance evaluations are public records because "they contain information relating both to the conduct of government and to the performance of governmental . . . functions").

Motion as to Mr. Cox's property interest claim, but denied summary judgment on the liberty interest claim. Defendants subsequently filed a Motion for Reconsideration asserting that the release of the termination letter did not constitute public disclosure so as to implicate Mr. Cox's liberty interest. The District Court denied this motion with respect to Petitioners Boxer and Farnell, holding that their placement of the stigmatizing termination letter in Mr. Cox's personnel file was sufficient public disclosure to implicate his liberty interest.

Petitioners then filed a second Motion for Summary Judgment asserting a qualified immunity defense on behalf of Ms. Boxer and Mr. Farnell. The District Court denied this motion, holding that in December 1998, the law was clearly established that the placement of a stigmatizing termination letter in a Washington public employee's personnel file could give rise to a liberty interest due process claim. The District Court explained:

> This Court holds that, in these circumstances, the law was clearly established that the placement of Mr. Cox's termination letter in his personnel file could give rise to a liberty interest, due process claim. In December 1998, it was beyond dispute that governments and government officials must provide sufficient due process to a terminated employee if the reasons for the termination were stigmatizing and false, and had been made public. It had also been settled in Washington State for five years, if not longer, that the PDA required Spokane County to disclose Mr. Cox's termination letter, which was of considerable, legitimate public interest. Furthermore, all of the Circuits which had addressed a statute similar to the PDA had held that the placement of a stigmatizing and false document

> in a file subject to such a statute was sufficient public disclosure for the purposes of a liberty interest, due process claim.

Appendix at App. 14.

Petitioners appealed the qualified immunity ruling to the Ninth Circuit. On February 20, 2004, the Ninth Circuit affirmed the District Court's denial of qualified immunity to Boxer and Farnell, holding "that placement of the stigmatizing information in Mr. Cox's personnel file, in the face of a state statute mandating release upon request, constituted publication sufficient to trigger Mr. Cox's liberty interest under the Fourteenth Amendment." *Cox v. Roskelley*, 359 F.2d 1105, 1112 (9th Cir. 2004).

REASONS FOR DENYING THE PETITION

The decision of the Ninth Circuit in this case does not conflict with the decisions of this Court, or any circuit court of appeals. Consistent with *Bishop v. Wood*, 426 U.S. 341 (1976), and *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Ninth Circuit held that a terminated public employee has a constitutionally protected liberty interest in clearing his name when stigmatizing information regarding the reasons for termination is publicly disclosed. The precise issue presented in this case is whether a liberty interest can arise from the placement of a document in a personnel file when (a) that document was clearly subject to public disclosure under state law, and (b) it was extremely likely that the press or the public would make such a request. Only one other circuit has addressed this precise issue. *Buxton v. City of Plant City, Florida*,

871 F.2d 1037 (11th Cir. 1989). The Ninth Circuit's holding that the placement of the termination letter in the employee's personnel file, and into the public record, constitutes sufficient disclosure to implicate the liberty interest is in harmony with *Buxton*. There is no circuit split on the issue presented.

There is no circuit split on the precise issue presented. Therefore, the Ninth Circuit did not err in failing to discuss the circuit split on the broader question of whether placement of a stigmatizing termination letter in the employee's personnel file is sufficient public disclosure to establish a Fourteenth Amendment liberty interest claim, in the absence of a state statute making the personnel file part of the public record. This question is not presented in this case.

In light of settled state law mandating public disclosure of Mr. Cox's personnel file on request, the Ninth Circuit properly held that the law was clearly established in December 1998 that placement of the stigmatizing termination letter in Mr. Cox's file would give rise to a liberty interest due process claim. The Court properly affirmed the District Court's denial of qualified immunity to Ms. Boxer and Mr. Farnell. The Petition for Writ of Certiorari should be denied.

A. There is No Circuit Split on the Issue Decided by the District Court and the Ninth Circuit.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court established that a terminated public employee has a constitutionally based liberty interest in clearing his name when stigmatizing information regarding the reasons for termination is publicly disclosed. Failure to provide a

"name-clearing hearing" in this circumstance is a violation of the Fourteenth Amendment's due process clause. *Id.* See also, *Codd v. Velger*, 429 U.S. 624 (1977); *Bishop v. Wood*, 426 U.S. 341 (1976). Some public disclosure of the stigmatizing reasons for termination is essential to implicate the employee's liberty interest. *Bishop,* supra.

In the instant case, the lower courts have considered whether there was sufficient disclosure of the stigmatizing information in Respondent Cox's termination letter to implicate his liberty interest. It was critical to the analysis of both the District Court and the Ninth Circuit that, under Washington State Public Disclosure law, Mr. Cox's termination letter became part of the public record immediately when it was placed into his personnel file. RCW 42.17.310; *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995, 1000 (1993). In its Order Denying Defendants' Second Motion for Summary Judgment, the District Court carefully articulated the issue presented:

> . . . [W]hether a liberty interest claim can arise from the placement of a document in a personnel file when (a) that document was clearly subject to public disclosure under state law and (b) it was extremely likely that the press or the public would make such a request.

Appendix at App. 11.

The Ninth Circuit was equally precise in stating its holding:

> We now hold explicitly that placement of the stigmatizing information in Cox's personnel file, *in the face of a state statute mandating release upon request*, constituted publication sufficient to

> trigger Cox's liberty interest under the Fourteenth Amendment.

Cox v. Roskelley, 359 F.3d, at 1112 (emphasis added).

Petitioners now seek a Writ of Certiorari, contending that this Court should accept review to resolve the circuit split on whether a document is "publicly disclosed" for purposes of *Bishop v. Wood*, supra, when it is placed in an employee's personnel file. However, that is not the issue raised by the facts of this case and decided by the District Court and the Ninth Circuit. The Ninth Circuit did not address or decide the generic issue of whether placement of a stigmatizing termination letter in a public employee's personnel file, standing alone, constitutes sufficient public disclosure to satisfy *Bishop*. Rather, the Court properly held that when a state statute makes the public employee's personnel file *part of the public record*, placement of a stigmatizing termination letter into the personnel file, i.e., into the public record, constitutes sufficient public disclosure to implicate the employee's liberty interest. 359 F.2d, at 1110 (" . . . once the stigmatizing information was placed into Mr. Cox's personnel file, it became a public record under Washington law, mandating disclosure upon request.") This holding was particularly appropriate in light of the intense local media coverage of Mr. Cox's termination.

There may be an emerging circuit split on the generic issue of whether placement of a stigmatizing termination letter in a public employee's personnel file, absent state law mandating disclosure, constitutes sufficient public disclosure for purposes of a liberty interest claim. Compare, *Donato v. Plainview School District*, 96 F.3d 623 (2nd Cir. 1996), cert. denied, 519 U.S. 1150 (1997); *Ledford v.*

Delancey, 612 F.2d 883 (4th Cir. 1980); with *Ortega-Rosario v. Alvarado-Ortiz,* 917 F.2d 71 (1st Cir. 1990); *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139 (3rd Cir. 1988). However, the instant case simply does not present that issue. The issue decided by the Ninth Circuit in the instant case concerned whether public disclosure occurs when, under the Washington Public Disclosure Act, the stigmatizing termination letter becomes part of the public record when placed in the discharged employee's personnel file.[2]

Only one other circuit has addressed this issue. See *Buxton v. City of Plant City, Florida,* 871 F.2d 1037 (11th Cir. 1989). Faced with a Florida statute that made the stigmatizing termination letter at issue part of the public record, the Eleventh Circuit reached the same conclusion as the Ninth, i.e., sufficient publication occurred to implicate the discharged employee's liberty interest. The *Buxton* Court explained at page 1045:

> Because of the stigmatizing material in Buxton's personnel file and the internal affairs report of the English incident, both a part of the public records pursuant to Fla.Stat. §§ 119.01 and 119.07, Buxton has been foreclosed from several employment opportunities. Buxton's rights "to live and work where he will"; "to pursue any livelihood or avocation"; and "to engage in the common occupations of life" have been limited by placing his personnel file and internal affairs report of the English incident into the public record.

[2] Indeed, if this Court were to grant Certiorari and decide the issue presented in this case, it would not resolve the circuit split reflected in *Donato,* supra and *Copeland,* supra, and other cases cited above.

> Buxton's personnel file and the internal affairs report of the English incident have stigmatized Buxton in the eyes of potential law enforcement employers and in the minds of citizens reviewing this public information. The personnel file and the internal affairs report became public, pursuant to Fla.Stat. § 112.433, at the conclusion of the investigation which culminated with Buxton's termination. Because the information in the file may be reviewed years after it is filed, its publication, for due process purposes, must be held to occur at the time of filing. Protection of the due process name clearing right cannot be effectively afforded any other way.

The Eleventh Circuit in *Buxton* and the Ninth Circuit in *Cox* are the only two circuit cases to address the issue presented in this case, i.e., whether placement of a stigmatizing termination letter in a public employee's personnel file constitutes sufficient disclosure to implicate the liberty interest when state law makes the personnel file (and the termination letter) part of the public record. The Eleventh and Ninth Circuits reached precisely the same conclusion on this issue. There simply is no circuit split on the issue presented. Certiorari should be denied.

B. This Case Does Not Present An Appropriate Occasion for the Court to Consider the Relevance of Extra Circuit Authority to the Qualified Immunity "Clearly Established" Inquiry.

Petitioners invite the Court to grant certiorari in this case to consider the "relevance of extra circuit authority to the qualified immunity 'clearly established' inquiry." This argument is premised on the claim that circuits other than the Ninth have reached different conclusions with respect

to the qualified immunity issue presented in this case. However, as discussed, supra, only one other circuit has addressed the publication/liberty interest issue presented to the Ninth Circuit in this case. *Buxton v. City of Plant City, Florida*, supra.

In the instant case, the Ninth Circuit followed the Eleventh Circuit's analysis in *Buxton*, and held that placement of the stigmatizing information in Mr. Cox's personnel file, "in the face of a state statute mandating release upon request," was sufficient publication to implicate Mr. Cox's liberty interest. 359 F.3d, at 1112. There is no contrary extra circuit authority. The Ninth Circuit properly applied this court's qualified immunity precedent. Certiorari should be denied.

Petitioners cite *Mustafa v. Clark County School District*, 157 F.3d 1169 (9th Cir. 1998) and *Llamas v. Butte Community College District*, 238 F.3d 1123 (9th Cir. 2001) to argue that the Ninth Circuit had previously acknowledged the circuit split on the issue of whether placement of stigmatizing information in an employee's personnel file constitutes sufficient publication to establish a due process liberty interest claim. In both *Llamas* and *Mustafa*, the Ninth Circuit noted the circuit split on this generic issue. However, in the instant case, the panel majority clearly distinguished *Llamas* and *Mustafa* and explained the fundamental difference in the issue now presented:

> A critical fact separates this case from *Mustafa* and *Llamas*: in this case, the parties agreed, and argued in their briefs and during oral argument, that once the stigmatizing information was placed into Cox's personnel file, it became a public record under Washington law, mandating disclosure upon request. This factor takes Cox's case

> beyond the holdings of *Mustafa* and *Llamas*, and into the realm of *Board of Regents v. Roth*. See 408 U.S. at 573, 92 S.Ct. 2701.

359 F.3d, at 1110.

The critical fact in this case is that, by operation of the Washington Public Disclosure Act, RCW 42.17, the stigmatizing termination letter became part of the public record when it was placed into Mr. Cox's personnel file. Petitioners Boxer and Farnell were both long term, high ranking administrative/management employees of Spokane County. The Spokane County Prosecuting Attorney's office confirmed unequivocally that the termination letter became part of the public record when placed into Mr. Cox's personnel file. There is no question that the Petitioners knew that placement of the stigmatizing termination letter into Mr. Cox's personnel file made it part of the public record.

Both the Ninth Circuit in the instant case, and the Eleventh Circuit in *Buxton*, supra, recognized that because the termination letter became part of the public record upon placement into the employee's personnel file (by operation of law), publication in fact occurred for purposes of the liberty interest claim. The Ninth Circuit properly applied the qualified immunity analysis to these facts. There was, and is, no contrary extra circuit authority to consider.

Governmental officials performing discretionary functions generally are granted a qualified immunity insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Wilson v. Layne*, 526 U.S. 603 (1999); *Anderson v. Creighton*, 483 U.S. 635 (1987).

The qualified immunity inquiry involves a two-step analysis. First the Court considers whether the facts alleged by the plaintiff demonstrate that the governmental official's conduct violated a constitutional right. If violation of a constitutional right is found, the Court must determine whether or not the contours of the violated right were clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194 (2001). In determining whether a constitutional right is "clearly established," for purposes of qualified immunity, the relevant, dispositive inquiry is whether it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted. *Id.*

In the instant case, Petitioners argue that, absent controlling Supreme Court or local circuit authority, "a Circuit split on the legal issue in question precludes a determination that the law is 'clearly established' on that issue." Petition for Certiorari at p. 25. It is true that there was no controlling Ninth Circuit authority on the issue presented at the time of Mr. Cox's discharge. This Court has been careful to caution that the absence of controlling circuit authority on the question of whether particular conduct violates a constitutional right does not entitle a governmental official to qualified immunity. *Hope v. Pelzer*, 536 U.S. 730 (2002). The salient question which the Court of Appeals was called upon to decide is whether the state of the law in 1998 gave Petitioners fair warning that placement of Mr. Cox's stigmatizing termination letter into his personnel file would constitute public disclosure. *Id.* The Washington Public Disclosure Act, and the Washington Supreme Court's 1993 decision in *Dawson v. Daly*, supra, made the answer to this question crystal clear. The termination letter became part of the public record when it

was placed into Mr. Cox's personnel file. Therefore, the state of the law in 1998 gave clear warning to Petitioners that placement of stigmatizing information into Mr. Cox's personnel file would constitute sufficient publication to implicate his liberty interest.

There was no contrary extra circuit authority for the Ninth Circuit to consider. The Eleventh Circuit was the only Court to address this issue prior to the instant case. *Buxton v. City of Plante City, Florida*, supra. The Ninth Circuit reached the same conclusion as the Eleventh Circuit in *Buxton*. Because there was no conflicting extra circuit authority for the Ninth Circuit to consider in conducting the qualified immunity analysis, this case does not provide the Court an appropriate opportunity to consider the significance of extra circuit authority on the issue of whether a constitutional right was clearly established.

The Ninth Circuit properly applied this Court's precedent in conducting the qualified immunity analysis in this case. It is well established that a terminated public employee has a constitutionally based liberty interest in clearing his name when stigmatizing information regarding the reasons for termination is publicly disclosed. *Board of Regents v. Roth*, supra. When the Petitioners placed the stigmatizing termination letter in Mr. Cox's personnel file, it became part of the public record by virtue of the Washington Public Disclosure Act, RCW 42.17. Therefore, placement of the stigmatizing termination letter in Mr. Cox's personnel file clearly constituted disclosure for purposes of the liberty interest claim. The Ninth Circuit properly concluded that Petitioners' conduct violated Mr. Cox's due process rights.

The panel majority also agreed with the District Court that the law was clearly established so that a reasonable public official "knew or should have known, that there would be 'some public disclosure' of the charges contained in the termination letter of a public employee embroiled in a dispute of public interest." 359 F.3d, at 1113. This was correct as a matter of law. It was plainly evident as a matter of fact.

The Washington Public Disclosure Act made Mr. Cox's termination letter part of the public record immediately when it was placed in his personnel file. RCW 42.17.310; *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993). There is no question that Petitioners knew or should have known this. A Spokane County Deputy Prosecuting Attorney confirmed this in a letter to Mr. Cox's counsel dated December 16, 1998. See *Hope v. Pelzer*, 536 U.S. 730 (2002) (Agency's Internal Memorandum confirming that conduct at issue may be unconstitutional buttressed conclusion that constitutional right was clearly established). As the District Court observed:

> From his suspension in September 1998 to his termination on December 11, 1998, the entire incident was front-page, top story news in the Spokesman Review, Spokane's daily newspaper. It was all but a foregone conclusion that when Mr. Cox was terminated on December 11, 1998, either the press or a member of the public would request a copy of the letter under the PDA.

Appendix at App. 10.

The District Court was correct. A member of the local press presented the public record request for Mr. Cox's

termination letter to Spokane County on December 14, 1998, the next business day following the December 11 termination letter.

There is no question that placement of the stigmatizing termination letter into Mr. Cox's personnel file, and therefore into the public record, constitutes "disclosure" for purposes of his liberty interest claim. There is no question that Petitioners knew this. The Ninth Circuit properly affirmed the District Court's denial of qualified immunity. The Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 26th day of July, 2004.

PAUL J. BURNS
Counsel of Record
PAUL J. BURNS, P.S.
1212 N. Washington,
Suite 224
Spokane, WA 99201
(509) 327-2213
Attorney for Respondents
Claude Cox
Linda Cox

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CLAUDE COX AND
LINDA COX,
husband and wife,

Plaintiffs,

vs.

FRANCINE M. BOXER,
in her individual capacity;
MARSHALL FARNELL,
in his individual capacity;
and SPOKANE COUNTY,
a municipal corporation,

Defendants.

NO. CS-99-0075-JLQ

MEMORANDUM ORDER AND OPINION DENYING DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 19, 2000)

Before the court is Defendants' second Motion for Summary Judgment (Ct. Rec. 58). The court held a hearing on this motion on September 7, 2000. Plaintiffs were represented by Paul Burns. Defendants were represented by Thomas Kingen.

I. Background

The full facts of this case have been described in detail in this court's earlier orders regarding Defendants' first motion for summary judgment and Defendants' motion for reconsideration (Ct. Recs. 44 and 57). It is sufficient, for the purposes of the present motion, to restate only a few pertinent facts.

This case arose out of Plaintiff Claude Cox's ("Mr. Cox's") December 11, 1998, termination from his position

as Risk Manager for Spokane County. The termination letter, which was signed by Defendant Spokane County employees Francine M. Boxer and Marshall Farnell, indicated that they had decided to terminate Mr. Cox for his role in processing claims for auto-body repairs related to a road-paving project performed by Defendant Spokane County that resulted in damage to many private vehicles.

Plaintiffs' complaint set forth two theories of recovery, both of which were based on notions of procedural due process. First, Plaintiffs claimed that Mr. Cox had a property interest in his job and that therefore the method of his termination violated his due process rights. Second, Plaintiffs claimed that the method of his termination was improper because the charges made in connection with his termination implicated his liberty interest in future employment.

Defendants filed their first motion for summary judgment in December 1999. On April 19, 2000, this court issued its order on that motion, holding that Mr. Cox did not have a property interest in his job but that he had raised an issue of fact regarding whether Defendants had violated his right to due process with regard to the liberty interest. Defendants asked this court to reconsider that ruling. On June 15, 2000, this court affirmed its conclusion that Plaintiffs had stated an issue of material fact regarding whether Defendants had violated his right to due process with regard to Mr. Cox's liberty interest, but held that his claim survived against only Ms. Boxer, Mr. Farnell, and Spokane County.

Defendants have now filed a second motion for summary judgment. They claim 1) that Plaintiffs have not stated a genuine issue of material fact as to the falsity of

the statements in the December 11, 1998, termination letter, 2) that Defendants provided Mr. Cox all of the process to which he was entitled, and 3) that Defendants are immune from liability for these claims.

II. Standard of Review

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the material facts before the court. *See Swig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975). The moving party is entitled to summary judgment when, viewing the evidence and the inferences arising therefrom in favor of the nonmoving party, there are no genuine issues of material fact in dispute. *See* Fed.R.Civ.P. 56(c).

III. Genuine Issue of Falsity

Defendants' motion attempts to revisit the issue of whether Plaintiffs have stated a genuine issue of material fact as to whether any of the statements in the termination letter were false. Defendants are correct that, to survive summary judgment, Plaintiffs must put into issue the truth or falsity of the statements which he claims implicated his liberty interest. *See Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977).

This court has already considered the falsity issue twice and concluded both times that Plaintiffs have raised a genuine issue of material fact as to the truth or falsity of the allegations in the termination letter. Although Defendants claim they are not rehashing previously decided issues, the issue of falsity has been a continual concern in

both the parties' briefing and the court's consideration of Defendants' previous motions. Defendants raised the issue in their briefing of their first motion for summary judgment (Ct. Rec. 34, p. 9) and in their briefing of the motion for reconsideration (Ct. Rec. 55, pp. 2-3). This court's orders on both those motions also expressly ruled on the issue. On April 19, 2000, this court held:

> As to the truth or falsity of the statements, Cox has repeatedly denied the allegations made in the newspaper and in his termination letter, both at the time of [the] newspaper articles and in declarations before this court. *Cox has stated a genuine issue of material fact as to the truth or falsity of the allegations Defendants made in their termination letter.* (Ct. Rec. 44, p. 12) (emphasis added).

On June 15, 2000, this court reconsidered the issue and held:

> At the hearing on the motion for reconsideration, there was considerable discussion regarding whether Cox had raised a genuine issue of material fact as to whether the charges made in the termination letter are false. Cox must show that the charges were both stigmatizing *and* false in order to recover, [*Citing Codd, supra*] However, Cox's affidavit makes it clear that he denies all of the charges made in connection with his termination. . . . *This is sufficient to raise a genuine issue of material fact about the truth or falsity of the statements.* (Ct. Rec. 57, p. 11) (emphasis added).

The court has already considered and denied Defendants' argument twice, and sees no reason to reverse itself. In addition, in response to the second motion for summary

judgment, Plaintiffs have submitted an additional affidavit from Mr. Cox in which he further denies, with greater specificity, all of the charges made in the termination letter. Although Defendants disagree with this court's previous resolution of the issue, the court will follow its earlier rulings.

IV. Qualified Immunity

Defendants also argue that Ms. Boxer and Mr. Farnell are qualifiedly immune from suit for their signing of the allegedly defamatory letter terminating Mr. Cox. These Defendants argue that it was not clearly established in December 1998 that a liberty-interest, due-process claim could arise from placing an allegedly false and stigmatizing document in a public employee's personnel file. This court has already held that a claim can arise from the placement of such a document in an employee's personnel file, as set forth in this court's June 15, 2000, Order. The question Defendants now present is whether the individual Defendants are immune from suit based on the law as it stood in December 1998. At oral argument on the Defendants' current motion for summary judgment, the court stated that its initial impression was that Defendants Boxer and Farnell were entitled to qualified immunity. However, upon reviewing the issue further in light of that argument and researching Washington State law, which at the time in question made it clear that the allegedly defamatory letter would be made available to the public and the press, the court has determined that Defendants Boxer and Farnell are not entitled to qualified immunity from this suit.

Public officials are entitled to qualified immunity for performing discretionary functions of their jobs "insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Wilson v. Layne*, 526 U.S. 603, 609 (1999). In determining whether an official enjoys qualified immunity this court must ask "1) was the law governing the official's conduct clearly established? 2) under that law, could a reasonable official have believed the conduct was lawful?" *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). As to the first prong of this inquiry, "'[c]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Wilson, supra*, 526 U.S. at 614-15, *quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

It is beyond question in this case that it was clearly established in December 1998 that public entities could not make false, defamatory, and public statements in connection with an employee's termination without providing the employee due process. Plaintiffs contend that this is a sufficiently narrow statement of the applicable legal rule and that therefore they have cleared the first hurdle of the qualified immunity analysis. Defendants counter that this court's inquiry into whether the law was clearly established in December 1998 must focus on a narrower question, namely whether it was clearly established that the placement of a termination letter in a public personnel file, without more, was sufficient public disclosure that would trigger the requirements of due process.

In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the Court made it clear that qualified immunity requires

> that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

The Ninth Circuit also recently made it clear just how precise the contours of the right must be for the purposes of qualified immunity analysis. In *Devereaux v. Perez*, 218 F.3d 1045 (9th Cir. 2000), the plaintiff had been investigated and indicted for alleged child abuse, only to have the charges dropped for lack of evidence. He sued in federal court, claiming that state officials had violated his due process rights by coercing witnesses into testifying against him. The court held that he had failed to show that there was a clearly established right that had allegedly been violated, and stated that the right which plaintiffs had to show was clearly established was the "right to have child witnesses, in a child abuse investigation, interviewed in a particular manner or pursuant to a particular protocol." *Id.* at 1053.

Devereaux thus indicates that in determining whether the applicable legal rule was clearly established, a court must focus on whether it was clearly established that the precise behavior at issue could violate constitutional rights. Given that precedent, this court agrees with Defendants that Plaintiffs bear the burden of showing that it was clearly established in December 1998 that Mr. Cox's liberty-interest, due-process rights could be violated by placing his termination letter in his personnel file, without more. Defendants claim that it was *not* clearly established

in December 1998 that they could violate Mr. Cox's rights by doing so.

Defendants rely on what, at first blush, appears to be a split in the Circuits on this issue. As this court noted in its June 15, 2000, Order, the Ninth Circuit has not yet ruled on the issue. *See Mustafa v. Clark County School District*, 157 F.3d 1169, 1179 n.10 (9th Cir. 1998). The Circuits which have decided the issue are to a certain degree evenly split, 3-3, with the Second, Fourth, and Eleventh Circuits holding that the placement of a document in a public employee's personnel file is sufficient to give rise to a due-process claim, and the First, Third, and Seventh Circuits holding that it is not, at least on the facts they considered in the cases before them. *Compare Donato v. Plainview School District*, 96 F.3d 623, 631-32 (2d Cir. 1996), *cert. denied*, 519 U.S. 1150 (1997); *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980); and *Buxton v. City of Plant City, Florida*, 871 F.2d 1037, 1044-45 (11th Cir. 1989) with *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74 (1st Cir. 1990); *Copeland v. Philadelphia Police Dep't.*, 840 F.2d 1139, 1148 (3d Cir. 1988); and *Olivieri v. Rodriguez*, 122 F.3d 406, 408-09 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1040 (1998). The Supreme Court has not ruled on the issue, although in *Codd v. Velger, supra*, the Court apparently assumed that the placement of a document in a public employee's personnel file constitutes public disclosure for the purposes of a procedural due process claim. *See* 429 U.S. at 625-27.

None of these cases, however, deal with the question of whether, under Washington law and in the particular circumstances of this case, it was clearly established that the placement of an allegedly defamatory letter in Mr. Cox's personnel file could constitute publication for the

purposes of a liberty-interest, due-process claim. As Plaintiffs point out, it was clear in December 1998 that once the termination letter was placed in Mr. Cox's personnel file, Washington State law required Spokane County to disclose the document in response to any request from the press or the public.

All government entities within the State of Washington are subject to the requirements of the Public Disclosure Act, RCW §§ 42.17.010-42.17.962 (the "PDA"). The PDA, which was adopted by voter initiative in 1972, denominates virtually any document generated by a public agency as a "public record" and requires disclosure of all public records unless one of the PDA's narrow exceptions applies. RCW §§ 42.17.020(36), 42.17.251, 42.17.260(1). Of those exceptions, only one arguably covers Mr. Cox's termination letter, the exception for "personal information . . . to the extent that disclosure would violate [an employee or official's] right to privacy." RCW § 42.17.310(1)(b). While this exception applies to some information in personnel files, a document is subject to the exception only if disclosure would be 1) highly offensive to a reasonable person, **and** 2) of no legitimate concern to the public. *See Dawson v. Daly*, 120 Wash.2d 782, 794-95 845 P.2d 995 (1993); RCW § 42.17.255.

In 1993, in *Dawson*, the Washington State Supreme Court held that routine performance evaluations of prosecutors are both highly offensive and not of any legitimate public interest. *See* 120 Wash.2d at 795-99. However, the court rested its decision on the fact that the evaluations in that case were routine and did not "discuss specific instances of misconduct or public job performance." *Id.* at 800. *Dawson* does not reach documents such as Mr. Cox's termination letter, which contains specific allegations of

mismanagement of substantial public funds. The Washington Court of Appeals explicitly held, after *Dawson* and prior to December 1998, that "there exists a reasonable concern by the public that government conduct itself fairly and use public funds responsibly." *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wash.App. 319, 328, 890 P.2d 544 (1995) (finding a legitimate public interest in fire chief's retirement agreement). *See also Tacoma Public Library v. Woessner*, 90 Wash.App. 205, 223, 951 P.2d 357 (Feb. 1998), *as amended on remand on other grounds*, 972 P.2d 932 (1999). Mr. Cox's termination letter was indisputably subject to disclosure because it contained specific charges both that he had acted unfairly while in his public office and that he had not used public funds responsibly. The public concern in the termination letter was legitimate and the privacy exception to Washington's disclosure laws was clearly inapplicable.

It was also highly likely that a member of the press or the public would request a copy of Mr. Cox's termination letter. As this court has repeatedly noted in its orders in this case, the Cox pre-termination suspension had received extensive coverage in the local press. From his suspension in September 1998 to his termination on December 11, 1998, the entire incident was front-page, top-story news in the *Spokesman Review*, Spokane's daily newspaper. It was all but a foregone conclusion that when Mr. Cox was terminated on December 11, 1998, either the press or a member of the public would request a copy of the letter under the PDA.

Spokane County received a request for the termination letter on December 14, 1998. Spokane County's response to that request shows that Spokane County was well aware in December 1998 that the PDA required

disclosure of the termination letter in light of the 1993 case of *Dawson v. Daly, supra*. On December 16, 1998, prosecutor James Emacio wrote to Mr. Cox's counsel to inform him that he had received the disclosure request and that Mr. Emacio planned to disclose a copy. Mr. Emacio wrote, "I am unaware of any provisions [in the PDA] which would preclude my release of the [termination letter] to [the local press]. It appears to me that the holding of *Dawson v. Daly* . . . is dispositive of this matter." (Ct. Rec. 30, Ex. B.)

It was thus not subject to debate in December 1998 that 1) a stigmatizing statement in connection with an employee termination would give rise to a liberty interest and a due-process requirement if that statement was made public, 2) Washington law mandated that the termination letter be disclosed upon request, and 3) the local press coverage of the entire incident made it extremely likely that the press or the public would request a copy of the termination letter. Defendants argue that nonetheless they cannot be held liable because the Circuits are split on whether the placement of a document in a personnel file, without more, is sufficient to give rise to a liberty interest claim.

A close look at the Circuit opinions which address whether a liberty-interest claim can arise from the placement of a document in a personnel file reveals that there is no Circuit split on the precise issue before the court, that issue being whether a liberty interest can arise from the placement of a document in a personnel file when a) that document was clearly subject to public disclosure under state law and b) it was extremely likely that the press or the public would make such a request. Of the three Circuits that have dismissed liberty-interest claims

in which the only alleged public disclosure was the placement of the document in the employee's personnel file, none of them have addressed a state statute such as Washington's PDA, and none of them concerned a highly publicized case such as Mr. Cox's.

For example, while the Seventh Circuit has stated that it requires actual disclosure of a document, none of its several cases address circumstances similar to that here. *See Ratliff v. City of Milwaukee*, 795 F.2d 612 626-27 (7th Cir. 1986) (discipline had not been made a matter of public concern; public disclosure statute not addressed); *Johnson v. Martin*, 943 F.2d 15, 16-17 (7th Cir. 1991) (no publicity of discipline; no state statute similar to the PDA discussed); *Clark v. Maurer*, 824 F.2d 565, 567 (7th Cir. 1987) (fact of termination was made public but employee's name was not; no state disclosure statute at issue); *Olivieri v. Rodriguez*, 122 F.3d 406, 408-09 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1040 (1998) (grounds for discipline not publicized; no state statute considered). The same holds true for the cases out of the First and Third Circuits, which have ruled much less frequently on the issue. *See Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74 (1st Cir. 1990) (there was no publicity of the discipline; no state statute was considered); *Copeland v. Philadelphia Police Dep't.*, 840 F.2d 1139, 1148 (3d Cir. 1988) (no publicity of the discipline; no state statute addressed.)

In contrast, all of the Circuit opinions which have considered the effect of a state statute which mandates public disclosure of a particular public record have held that if the record is stigmatizing and false, its mere creation is sufficient public disclosure for the purposes of a liberty-interest claim. In *Buxton v. City of Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989), public officials

had placed an allegedly false stigmatizing letter in the plaintiff-employee's personnel file. Under Florida law, the letter was a public record and its disclosure was required upon request. *See id.* at 1044-45. In fact, a refusal to provide the letter to a member of the public upon request could have resulted in criminal sanctions. *See id.* at 1044. The Eleventh Circuit held that in light of this statute requiring disclosure of the letter, placing the document in the file was sufficient public disclosure for the purposes of the plaintiff's liberty-interest claim. *See id.* at 1045-46.

The Second Circuit, in *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), reached a similar conclusion. In that case, the plaintiff's name had been placed on a register of child abusers. Although the government did not take the initiative in distributing the list of abusers to the public, New York law required certain employers to consult the list before hiring an individual. *See id.* at 995-96. The fact that the stigmatizing information had to be disclosed under state statute was enough to make the inclusion of the plaintiff's name in the register, without more, sufficient public disclosure for the purposes of a liberty-interest claim. *See id.* at 1000.

These are the only two Circuit cases which this court has found that address whether the presence of a state statute mandating disclosure of a particular document or record can make the creation of that document or record sufficiently public for the purposes of a liberty-interest claim. There are no appellate decisions to the contrary, and thus no Circuit split on the issue which would result in qualified immunity. Although the Ninth Circuit has yet to rule on the issue, "[a] right can be clearly established even though there [is] no binding precedent in [the] circuit." *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir.

1989), *cert. denied*, 493 U.S. 1097 (1990), *citing Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988).

This court holds that, in these circumstances, the law was clearly established that the placement of Mr. Cox's termination letter in his personnel file could give rise to a liberty-interest, due-process claim. In December 1998, it was beyond dispute that governments and government officials must provide sufficient due process to a terminated employee if the reasons for the termination were stigmatizing and false, and had been made public. It had also been settled in Washington State of 5 years, if not longer, that the PDA required Spokane County to disclose Mr. Cox's termination letter, which was of considerable, legitimate public interest. Furthermore, all of the Circuits which had addressed a statute similar to the PDA had held that the placement of a stigmatizing and false document in a file subject to such a statute was sufficient public disclosure for the purposes of a liberty-interest, due-process claim.

This does not end the court's analysis, however. As noted earlier, the court must also analyze whether, in light of the clearly established law, a reasonable officer could have believed his conduct was lawful. *See Act Up!, supra*, 988 F.2d at 871. "[I]t is the defendants' burden to show that 'a reasonable officer could have believed, in light of the settled law, that he was not violating a constitutional or statutory right.'" *Munger v. City of Glasgow Police Dep't.*, ___ F.3d ___, 2000 WL 1252086, *4 (9th Cir.), *quoting Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir. 1997). "Where 'conflicting inferences may be drawn from the facts [concerning the 'reasonable conduct' issue], the case must go to the jury.'" *Munger, supra,* at *4, *quoting*

LaLonde v. County of Riverside, 204 F.3d 947, 959 (9th Cir. 2000).

This court holds that, in light of this clearly established law, it was not reasonable for Mrs. Boxer and Mr. Farnell to believe that they would not implicate Mr. Cox's liberty interests if they placed this letter in his termination file. The requirement that a reasonable official would have known their actions may have violated clearly established law is to allow the officials to "reasonably anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). There was ample reason in this case for a reasonable public official to be aware that the placement of the December 11, 1998, termination letter in Mr. Cox's personnel file could give rise to liability for violating Mr. Cox's rights to due process. First, as already noted, the law was clearly established. Second, the termination letter itself contained serious, stigmatizing charges which Mr. Cox had denied. Third, the local press had covered the issue extensively for several months, making it extremely likely that the press or public would request a copy of the termination letter – which had to be disclosed under the PDA. In these circumstances, a reasonable officer would have expected that the termination letter, once signed and placed in Mr. Cox's personnel file, would be disclosed to the public in very short order.

It was thus clearly established in 1998 that the actions of Defendants Boxer and Farnell could subject them to liability for a liberty-interest, due-process claim, and a reasonable officer would have been able to anticipate that liability in this case. Defendants Boxer and Farnell are thus not entitled to qualified immunity.

It should be noted that, absent the PDA's clear requirement that the termination letter be disclosed, this court would have found that Defendants Boxer and Farnell were entitled to qualified immunity because of the split in the Circuits on the issue of whether, absent such a statute, the placement of a document in a personnel file is sufficient public disclosure. However, given the broad provisions of the PDA, no reasonable Spokane County employee could have any question that under these circumstances, Cox's termination letter was public, subject to PDA disclosure, and extremely likely to be disclosed to the press or the public shortly after Cox was termination. Nor would a reasonable Spokane County officer have doubted that he could be found liable for a violation of Mr. Cox's due process rights if the contents of the termination letter were found to be false and stigmatizing and it was found that Mr. Cox did not receive all of the process he was due.

For the reasons stated above, the individual Defendants Boxer and Farnell are not entitled to qualified immunity. Nor, it should be noted, does Defendant Spokane County enjoy immunity. *See Leatherman v. Tarant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) ("it [is] quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit – either absolute or qualified – under § 1983."); *Wallis v. Spencer*, 202 F.3d 1126, 1143 (9th Cir. 2000) ("There are . . . no personal immunities available vicariously or otherwise to municipal actors under § 1983."). Municipalities can be held liable for the actions of the officers, even if those officers are immune, if the officers acted pursuant to the municipality's policy or practice or the officers were themselves policymakers for the municipality. *See Monell*

v. Dep't of Social Services of the City of New York, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.E.2d 611 (1978). As this court has already held, Ms. Boxer and Mr. Farnell had the authority to terminate Mr. Cox and to draft his termination letter, and therefore were policymakers for whose actions Spokane County is accountable.

V. The Timing and Type of Process

Defendants further contend that this court must grant them summary judgment because they gave Mr. Cox all of the process which he was due. Essentially, they contend that it was enough under the Constitution to allow Mr. Cox to respond to the charges against him in writing before he was terminated.

A description of the process afforded Mr. Cox is necessary to set the stage. In September 1998, Mr. Cox was placed on administrative leave, with pay, pending an investigation into his handling of claims arising out of the Bigelow Gulch road construction. Following an extensive investigation of the Bigelow Gulch claims and other incidents in Mr. Cox's employment, on November 5, 1998, Ms. Boxer and Mr. Farnell wrote to Mr. Cox to inform him that they were considering discipline for him, including possible termination. The letter set forth various charges against Mr. Cox and informed him that he could respond in writing no later than November 12, 1998. Mr. Cox's counsel, upon receiving the letter, requested and received an additional week to respond. His request for a further extension was denied. On November 19, 1998, Mr. Cox responded to the charges, through counsel. His counsel claimed that Defendants had given Mr. Cox insufficient time to respond.

On December 9, 1998, Ms. Boxer and Mr. Farnell wrote another letter to Mr. Cox in which they stated that they had found additional evidence of improper dealings in the Bigelow Gulch claims and instructed him to respond within two days, no later than December 11, 1998. Mr. Cox responded on December 9, 1998, through counsel. On December 11, 1998, Ms. Boxer and Mr. Farnell terminated Mr. Cox. Mr. Cox never received an in-person hearing with Ms. Boxer, Mr. Farnell, or the Spokane County Commissioners, either before or after he was fired.

In order to determine whether this was sufficient process, this court must apply the three-part test set forth in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Under that test, a court determines whether the type and timing of the process given were sufficient by balancing 1) the private interest that will be affected by the official action, 2) the risk that an erroneous deprivation will occur without additional procedure, and 3) the government's interest, which includes the interest in avoiding the fiscal and administrative burdens of providing additional process. *See id.* at 335. There is no fine line between sufficient and insufficient process – a court must consider these factors against the factual backdrop of the case at hand. *See Brady v. Gebbie*, 859 F.2d 1543, 1554 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100 (1989) ("when the hearing must be held and what procedural protections must be given at the hearing are determined on a case-by-case basis"); *Brewster v. Board of Ed. of the Lynwood Unified School District*, 149 F.3d 971, 983 (9th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999) ("procedural due process essentially boils down to an ad hoc balancing inquiry"). There is no particular type of process that must be provided if process is due – the required process could be an

evidentiary hearing or something considerably less intricate, such as the right to present evidence in writing. *See Brady, supra*, 859 F.2d at 1554. *See also Eldridge, supra*, 424 U.S. at 348 ("The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances.") In this particular instance, where this court is considering the merits of Defendants' motion for summary judgment, the court's inquiry is limited to determining whether, as a matter of law, the process given was sufficient.

As for the first element of the *Eldridge* test – Mr. Cox's interest in further process – this court finds that Mr. Cox had a strong interest in additional process. Mr. Cox had been an employee of Spokane County for more than 15 years when the Bigelow Gulch claims arose, and he worked in a position imbued with considerable public trust, as he held the power to approve payment of damage claims. The termination letter charges him with a serious breach of that public trust. In short, the letter charges that he had an improper relationship with the owner of the body shop which had done most of the repair work on the Bigelow Gulch cars; he had failed to investigate claims, leading to overpayment and payment for work not performed; and he had failed to respond to the concerns of his superiors, the Spokane County Commissioners. Whether true or false, these charges label Mr. Cox as a man of questionable judgment and character and would make any possible future employer pause before placing Mr. Cox in a position of responsibility.

In addition, the charges were very public. The Bigelow Gulch incident and its aftermath had received considerable coverage in the local newspaper, the *Spokesman-Review*. From Mr. Cox's suspension in September 1998 to

his termination in December 1998, Mr. Cox was a repeated target of the newspaper coverage. The articles (described in some detail in this court's earlier orders) display a deep public fascination with Mr. Cox and the various state and local investigations into the matter. Included in the articles were insinuations that unattributable sums of money had appeared in Mr. Cox's bank account during the time of the Bigelow Gulch incident, hints that criminal investigations were underway, and regular reports on the disciplinary process. Although none of the stinging allegations were attributed to any of the Defendants in this case, the newspaper articles are nonetheless relevant to determining the timing and amount of the process Mr. Cox should have received. *See Matthews v. Harney County, Oregon, School Dist. No. 4*, 819 F.2d 889, 894 (9th Cir. 1987). This court holds that given the nature of Mr. Cox's position, the seriousness of the allegations, and the extensive press coverage of the incident, Mr. Cox had a very strong interest in a name-clearing hearing in which he could refute the charges.

The second *Eldridge* factor (the risk of an erroneous deprivation) also suggests that summary judgment is not proper. There is no doubt that Spokane County performed an extensive review of the Bigelow Gulch claims. Spokane County prepared an October 30, 1998, report which provided extensive detail of potential problems with Mr. Cox's handling of the claims. In addition, Spokane County reviewed reports from Washington State auditors who had investigated the matter. However, Mr. Cox received only a limited opportunity to respond and explain the apparent problems. He was given just two weeks to respond to the initial factual allegations against him, and only 2 days to respond to a supplemental allegation. He was allowed only

to respond in writing and did not receive any in-person hearing regarding the allegations of misconduct.

There are also issues of fact concerning whether Defendants adequately reviewed the responses that Mr. Cox provided. The decision to terminate Mr. Cox was apparently made by Ms. Boxer, although the ultimate authority appears to have rested with the Spokane County Commissioners. Ms. Boxer testified in a deposition that two of the three Commissioners ratified the decision to terminate Cox. (Ct. Rec. 71, Ex. B.) Yet two of the Commissioners testified in depositions that they had no recollection of whether the Commissioners ever reviewed or considered Mr. Cox's November 19, 1998, letter in response to the charges made in Ms. Boxer and Mr. Farnell's letter of November 5, 1998; one of those Commissioners indicated that he was never given a copy of the November 19, 1998, letter. (Ct. Rec. 71, Exs. A and C.) There is thus an issue of fact concerning whether the decision to terminate Mr. Cox was made without considering Mr. Cox's responses to the charges against him. The Ninth Circuit has made it clear that providing a person with the form of due process, without also providing him the substantive consideration required by due process, does not satisfy Constitutional requirements. *See Harney County, supra*, 819 F.2d at 893-94. There is thus an issue of fact concerning whether Mr. Cox received sufficient consideration of his response. That issue of fact is also extremely material to this case, since if the Commissioners entirely ignored Mr. Cox's responses, there was a very high risk of an improper deprivation of Mr. Cox's liberty interests.

This brings the court to the third *Eldridge* factor, the government's fiscal and administrative interests. Defendants claim that Spokane County had a very strong

interest in bringing Mr. Cox's employment to an end without further due process because his position granted him significant power over public funds which the County had a duty to protect. The Supreme Court has recognized that the government has a strong interest in "expeditious removal of unsatisfactory employees." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543, 105 S.Ct. 1493, 84 L.Ed.2d 494 (1985). However, the Court has also recognized that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." *See id.* at 544-45. That is precisely what Spokane County did here – Mr. Cox was suspended with pay for 3 months before his termination, thus alleviating any need to terminate him without a more complete hearing. It appears that the government's interest in not providing Mr. Cox with additional process was the interest in not paying him further and in not paying the costs associated with a public hearing. These are not especially compelling interests, as they will arise in virtually every termination of a high-profile employee.

After balancing the interests, the court cannot say that, as a matter of law, Defendants gave Mr. Cox all the process that he was due under the *Eldridge* test. Mr. Cox had a particularly strong interest in protecting his reputation in an environment that had been substantially colored by extensive and unfavorable news coverage. The government's interests in denying Mr. Cox an in-person hearing are particularly weak in comparison. In addition, there is an issue of fact concerning whether the process they did provide put form over substance, thereby creating a great risk that Mr. Cox would be wrongfully deprived of his liberty interests. This balance

does not compel the conclusion that, as a matter of law, Defendants provided him with sufficient process.

The court notes that the foregoing conclusions are supported by numerous cases that the parties have cited to the court or that the court has located and reviewed on its own. In many of these cases, the dispute centered over whether or not the plaintiff had received sufficient *pre-deprivation* due process even though the plaintiff had also received a *post-deprivation* evidentiary hearing. The courts have thus assumed in cases similar to this one that an in-person hearing was required or appropriate after termination, *in addition to* pre-deprivation process similar to that provided in this case.

In *Matthews v. Harney County, supra*, for example, a public-school teacher had been fired on stigmatizing grounds amid a whirlwind of unfavorable press coverage. The teacher received minimal pre-deprivation process but within a month after her termination, she received an evidentiary hearing before the high school board. Several months later, she received a further evidentiary hearing before the elementary school board. *See* 819 F.2d at 890-91. Despite this considerable post-deprivation process, however, the Ninth Circuit held that there were issues of fact concerning whether she received sufficient process because of deficiencies in the pre-deprivation process. *See id.* at 892-94. She may not have received due process even though she received two post-deprivation evidentiary hearings before two different bodies. In light of such precedent, this court cannot say that Spokane County's procedures in this case, which involved no in-person hearing of any kind, were sufficient as a matter of law.

Similarly instructive is *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773 (9th Cir. 1982), another case involving a public school teacher alleging a deprivation of his liberty and property interests without sufficient process. In that case, the teacher had been dismissed without any pre-termination process but had been given a full evidentiary hearing one month after his termination. *Id.* at 775-76. Despite the fact that the former employee had received the opportunity to present evidence and cross-examine the witnesses against him at the post-termination hearing, the Ninth Circuit affirmed an award of damages to the employee for the lack of pre-termination process. *See id.* at 780-81. Again, a full post-termination evidentiary hearing was still not sufficient due process.

If in *Vanelli* and *Harney County*, as in several other cases, an employee's due process rights were not satisfied by a full post-termination evidentiary hearing, then this court cannot hold in this case that as a matter of law Spokane County provided Mr. Cox sufficient due process when they gave him only two weeks to respond in writing and never allowed him the opportunity to present his case in person.

The court notes that Defendants have attempted to distinguish the requirements of *Vanelli, Harney County*, and other cases on the grounds that they involved property interests, as opposed to liberty interests. However, the Ninth Circuit has rejected any notion that, as a matter of law, liberty interests are entitled to less process than property interests, by stating that a "liberty interest . . . may or may not [require] more exacting . . . procedures" than a property interest. *See Harney County, supra*, 819 F.2d at 893. The fundamental question is whether the process given was sufficient to protect the particular

interest at hand. In this case, the court cannot say that as a matter of law the process was sufficient to protect Mr. Cox's liberty interest and therefore the court must deny Defendant's Motion for Summary Judgment.

VI. Conclusion

IT IS HEREBY ORDERED that Defendants' second Motion for Summary Judgment (Ct. Rec. 58) is DENIED.

IT IS SO ORDERED, The Clerk is hereby directed to enter this Order and provide copies to counsel.

DATED this 19th day of September 2000.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

CLAUDE COX AND LINDA COX, husband and wife,

Plaintiffs,

vs.

JOHN ROSKELLEY, in his individual capacity; KATE McCASLIN, in her individual capacity; PHILLIP D. HARRIS, in his individual capacity; FRANCINE M. BOXER, in her individual capacity; MARSHALL FARNELL, in his individual capacity; and SPOKANE COUNTY, a municipal corporation,

Defendants.

NO. CS-99-0075-JLQ

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION

(Filed Jun. 15, 2000)

Before the Court is Defendants' Motion for Reconsideration or Certification (Ct. Rec. 49). The court held a hearing on this motion on June 14, 2000. Plaintiffs were represented by Paul Burns, Defendants were represented by Thomas Kingen.

I. Background

On April 19, 2000, this court granted in part and denied in part Defendants' motion for summary judgment. The court held that Plaintiff Claude Cox ("Cox") did not have a property interest in his position at Spokane County

but that he had stated a genuine issue of material fact concerning whether Defendants had violated his liberty interest in future employment. On May 3, 2000, Defendants requested that this court reconsider its ruling on the liberty interest or, in the alternative, to certify an interlocutory appeal on certain issues. The court has heard argument on the motion and has fully considered the issues and now issues its opinion on the merits of that motion.

The facts of the case are outlined in the court's April 19, 2000, Order. However, it should be noted for the sake of background that Cox claims Defendants implicated his liberty interest in future employment when they terminated him in December 1998. He claims that a September 1998 press release, quotes of Defendants in various newspaper articles, and his December 11, 1998, termination letter all implicated his liberty interest. Defendants' contend that none of those documents implicated his liberty interest and that, even if they did, Cox has not shown that any of the Defendants can be held liable for the infringement on his liberty interest.

II. Liability for Creation and Distribution of the Termination Letter

Much of Defendants' current motion focuses on the contention that this court incorrectly held that Defendants could be held liable for the statements made in the December 11, 1998, letter which informed Cox that he had been terminated from his position as Spokane County's Risk Manager. Defendants lodge several challenges to the court's reliance on the termination letter.

A. Liability for Disclosure According to State Law

Cox's termination letter was distributed to a local journalist only after that journalist requested it under a Washington State statute which requires disclosure of such documents. Defendants claim that they should not be held liable for disclosing the letter in accordance with state law. In the alternative, they request that this court certify an interlocutory appeal of this question.

The request for certification is based on the fact that the Ninth Circuit has apparently not yet ruled on the question of whether disclosure of public documents in accordance with an applicable statute can give rise to a liberty interest claim. The only case cited by the parties which addresses the issue – and the only case this court located in its own research – is *Buxton v. City of Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989). In *Buxton*, the plaintiff claimed that his termination letter stigmatized him, although it had only been placed in his personnel file and was not distributed to the press. *See id.* at 1042-46. The plaintiff contended that the letter had nonetheless been made public because a state statute made all public employee records accessible to the public (and future employers). The Eleventh Circuit agreed, holding that "the stigmatizing information placed into the public record by a state entity, pursuant to a state statute or otherwise, constitutes sufficient publication to implicate the liberty interest under the due process clause . . . " *Id.* at 1046.

Cox urges this court to follow the Eleventh Circuit, while Defendants urge this court to reject *Buxton* as placing an unfair burden on governments which comply

with applicable law. However, of the rule announced in *Buxton* and the rule proposed by Defendants (that disclosure pursuant to a statute cannot give rise to liability), only the *Buxton* rule offers sufficient protection for the liberty interests of public employees. A public employee's liberty interest has been implicated when his government employer "impose[s] on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

If this court were to adopt Defendants' position, a government employer could falsely and wrongfully stigmatize an employee and disable that employee from ever finding work again, so long as the employer disclosed its defamatory documents only when a member of the public requested that they do so. Defendants' rule would put form over substance. The *Buxton* rule, on the other hand, properly places the burden on the government to ensure that its charges against employees are truthful and accurate, regardless of whether the government plans to publicize those charges on its own initiative. This court will not adopt a rule that would allow municipalities to use statutory obligations to shield stigmatizing comments from judicial review. Public disclosure, whether required by statute or not, is still public disclosure. As the *Buxton* court noted, "[p]rotection of the due process name clearing right cannot be effectively afforded any other way." *See Buxton*, 871 F.3d at 1045.

The termination letter, therefore, is subject to review by this court for the purposes of considering Plaintiffs' claim of liberty interest deprivation without due process. The court does not find that there is sufficient question

about what the proper rule is to warrant certification of the issue for appeal. That request is denied.

B. The Contents of the Termination Letter

Defendants also argue that this court erred when it held that the termination letter raised an issue of act as to whether Defendants implicated Cox's liberty interest. As noted in the court's April 19, 2000, Order, the government implicates an employee's liberty interest if it impugns his "reputation for honesty or morality," *Matthews v. Harney County, Oregon, School District No. 4*, 819 F.2d 889, 891 (9th Cir. 1997), or puts his "good name, reputation, honor, or integrity . . . at stake." *Roth*, *supra*, 408 U.S. at 573. In contrast, "a charge of incompetence or inability to get along with coworkers . . . does not" give rise to a liberty interest claim. *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 365 (9th Cir. 1976).

Defendants argue, as they did in the briefing of the motion for summary judgment, that the termination letter charges Cox with incompetence and poor management but does not question his honesty, morality, honor, or good name. Once again, in determining whether an issue of fact exists, the court rejects this claim.

The letter, read as a whole, arguably charges Cox with dishonesty. *Inter alia*, the letter includes the following charges regarding his relationship with Ken Orrino, the owner of Specialty Auto, and Cox's approval of claims submitted by Specialty Auto:

- "A[n] example of inappropriate handling and/or processing of claims was that of RAC Trucking. That claimant is a long-haul driver. He has advised that he has not had

time to take his truck in for repair. However, you approved a payment of $2,187.96 to Specialty for repairs and cleaning that were never done." (Ct. Rec. 22, Ex. 5, p. 2.)

- "In addition to your failure to properly handle and process claims, you also used poor judgment in your conversation with Phil Camp at Camp Automotive, Inc. upon learning that one of his employees had called the County Commissioners Office with concerns of a possible over-charging by Specialty for services it was providing. Instead of being concerned about overcharges, you advised Mr. Camp that you did not like being called on the carpet by your superiors based upon a telephone call from one of his employees." (p. 2-3.)

- "Lastly we believe it is inappropriate for you to suggest to department staff that they take their automobiles to Specialty for auto repair when you have the discretion to direct a significant amount of County business to Specialty. Neither is it appropriate to encourage other County employees, who are interested in purchasing automobiles, to contact Mr. Orrino who you refer to as 'your friend in the business.' Likewise, your engaging in personal business transaction(s) with Mr. Orrino, when you have the discretion to direct a significant amount of County business to Specialty, is not good managerial judgment." (p. 3.)

While the termination letter dresses up these and other allegations as charges of only "poor judgment" and incompetence, they are substantially more than that. The passages quoted above arguably charge Cox with maintaining a

personal relationship with a body shop owner who billed the County for work he did not do, yet was nonetheless paid for because Cox approved the payment. And when someone expressed concern about the overall arrangement, Cox allegedly verbally abused him. There is no doubt that these charges, if true, establish extremely poor judgment on Cox's part (and of course, Plaintiffs bear the burden proving that the statements in the termination were false). But the charges in the letter also arguably implicate his reputation for honesty or morality, as they give the reader the distinct impression that Cox was favoring his friend and trying to keep it quiet.

This is not to say that the statements in the termination letter were false and stigmatizing as a matter of law. Rather, this court merely holds that an issue of fact exists as to whether the termination letter contains false statements with implicate Cox's reputation for honesty or morality.

Defendants also claim that this court erroneously concluded that the termination letter raised an issue of fact only in light of the earlier newspaper articles. Defendants are incorrect. The Order states that "genuine issues of fact exist as to whether the Defendants defamed Mr. Cox's reputation for honesty or morality, particularly when one considers that [the charges in the termination letter] were made in light of the numerous newspaper articles on the incident." It is clear from this passage that the court found the termination letter problematic when viewed in isolation. The court has not ruled that the newspaper articles are admissible at trial. In any event, the court now explicitly holds that the termination letter, on its own and without consideration of the circumstances in which it was disclosed, raises issues of fact as to

whether the letter falsely implicated Cox's reputation for honesty or morality.

C. Distribution by Placement in the Personnel File

Defendants also claim that they cannot be held liable for the statements in the termination letter because none of the Defendants named in this case actually distributed the letter to the public (the letter was distributed by County prosecutor Jim Emacio). Cox counters that it makes no difference who distributed the termination letter because it is enough that it was placed in Cox's personnel file and thus subject to possible disclosure to the public.

This issue presents the court with an interesting question. While the Ninth Circuit has noted that some courts have held that placement of a document in a personnel file is sufficient disclosure for a liberty interest claim, it has not yet decided the issue. *See Mustafa v. Clark County School District*, 157 F.3d 1169, 1179 n.10 (9th Cir. 1998). Those Circuits which have addressed the issue are evenly divided. The Second, Fourth, and Eleventh Circuits have all concluded that the placement of a document in a personnel file is sufficient to give rise to a liberty interest claim. *See Donato v. Plainview School District*, 96 F.3d 623, 631-32 (2d Cir. 1996), *cert. denied*, 519 U.S. 1150 (1997); *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980); *Buxton, supra*, 871 F.2d at 1044-45. In addition, *Codd v. Velger*, 429 U.S. 624, 625-627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) appears to support this position since the Court in that case assumed, without actually ruling, that the placement of a document in a public employee's personnel file is sufficient to give rise to

a liberty interest claim. However, the First, Third, and Seventh Circuits have all held squarely to the contrary. *See Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74 (1st Cir. 1990); *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139, 1148 (3d Cir. 1988); *Olivieri v. Rodriguez*, 122 F.3d 406, 408-09 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1040 (1998).

This court will follow the Second, Fourth, and Eleventh Circuits in holding that placement of a document in a public employee's personnel file is sufficient disclosure of that document to the public for the purposes of a due process liberty interest claim. As discussed earlier when this court held that distribution pursuant to statute can give rise to liability, government employers bear the burden of ensuring that charges in connection with employee terminations are accurate and not defamatory. If a government official places a statement about a terminated employee in a personnel file that is subject to public inspection, the official should be held liable if the statement proves to be defamatory. This rule will not, as Defendants appear to claim, impose liability on innocent parties. Rather, the rule imposes liability only where the official 1) makes defamatory statements in connection with termination of an employee and 2) places those statements where they can be viewed by the public.

Defendants claim that this holding is contrary to *Bishop v. Wood*, 426 U.S. 341 (1976), but it is not. While *Bishop* made it clear that a liberty interest plaintiff must establish that the charges were made public, that case is materially distinguishable from this case. *Bishop* involved allegedly false charges that were made orally and only to the employee in private. *See id.* at 348. (They were also made in response to interrogatories during litigation but

that was held to be not in connection with the termination. *See id.* at 348-49.) There was no evidence that the *Bishop* defendants had ever mentioned the charges to a member of the public or that they had made the charges accessible to the public. *Bishop* does not address the situation at issue here, where the charges were made available to the public but were not actually distributed by the same person who made them accessible. This court believes that the best, and proper, rule is that government employers can be held liable if they place a stigmatizing and false allegation into a publicly accessible personnel file.

The termination letter explicitly provides that a "cc" copy will be placed in Cox's personnel file. Therefore, because there is a genuine issue of fact as to whether that letter falsely implicated Cox's liberty interest, there is a genuine issue of fact as to whether the person(s) who caused that letter to be placed in Cox's file deprived Cox of his liberty interest without due process of law. As Defendants Francine Boxer and Marshall Farnell signed the letter, there is a genuine issue of fact as to whether they deprived Cox of his liberty interest without due process of law.

III. The Liability of the Individual Defendants

Defendants also contend that, even if the termination letter was defamatory, Plaintiffs have not established a genuine issue of material fact as to whether any Defendant deprived Cox of his liberty interest. The court considers this argument with regard to each individual Defendant.

A. Francine Boxer

Defendant Francine Boxer is the Spokane County Administrator. As already noted, because Ms. Boxer signed the termination letter, there is a genuine issue of material fact as to whether Ms. Boxer deprived Cox of his liberty interest without due process of law. Ms. Boxer was also quoted in several *Spokesman-Review* articles about the investigation of Cox, but this court need not consider whether those quotes also raise genuine issues of material fact.

B. Marshall Farnell

Defendant Marshall Farnell, Spokane County's Director of Administrative Services, also signed the termination letter. Therefore, there is a genuine issue of material fact as to whether Mr. Farnell deprived Cox of his liberty interest without due process of law.

C. Phillip Harris

Defendant Phillip Harris, a Spokane County Commissioner, did not sign the termination letter. Nor is there any statement in the newspapers or elsewhere attributed to Commissioner Harris. Commissioner Harris is therefore entitled to summary judgment as to Cox's liberty interest claim and Plaintiffs' claims against him shall be dismissed with prejudice.

D. Kate McCaslin

Defendant Kate McCaslin, a Spokane County Commissioner, did not sign the termination letter, but she was quoted or named as a source in three separate newspaper articles. On September 10, 1998, the *Spokesman-Review*

quoted her as saying that the state auditor's investigation would answer "How were those vendors selected? How were people referred? How did they arrive at the price they charge people? How did they determine what work actually needed to be done?" (Ct. Rec. 24, Ex. 6.) On September 30, 1998, the paper reported that she had said, "We're going to get to the bottom of this and we'll inform the public at the appropriate time. I don't think we have anything to hide, although we might have something to be embarrassed about." (Ct. Rec. 24, Ex. 9.) On November 3, 1998, a newspaper article stated that Commissioner McCaslin had indicated that a decision on Cox's future employment would be made in the near future. (Ct. Rec. 24, Ex. 12.)

Cox also claims that Commissioner McCaslin was the source of numerous other press leaks that were not attributed to any particular source, but he has submitted absolutely nothing to support that contention. As for the statements that the paper did attribute to Commissioner McCaslin, there is nothing about them that implicates Cox's reputation for honesty or morality. Rather, Commissioner McCaslin was merely commenting on the scope of the state auditor's investigation and deferring comment on the substance of the investigation. There is no genuine issue of material fact as to whether Commissioner McCaslin made any statement that implicated Cox's liberty interest. Commissioner McCaslin is therefore entitled to summary judgment as to Cox's liberty interest claim and this court will dismiss Plaintiffs' claims against her with prejudice.

E. John Roskelley

The *Spokesman-Review* twice quoted Defendant John Roskelley, also a Spokane County Commissioner. According

to the September 10, 1998, article, he said, "I don't feel comfortable spreading rumors. There were concerns over the quality of work being done, that maybe they were too overzealous in cleaning and doing the work." (Ct. Rec. 24, Ex. 6.) This statement does not defame Cox's honesty or morality. In fact, it defers comment on the allegations and appears to discuss Specialty Auto's actions, not what Cox allegedly did or did not do.

The second quote, which appeared in the September 30, 1998, article, read, "If he gets cleared of wrongdoing, he'll be reinstated." (Ct. Rec. 24, Ex. 9.) This statement requires further examination. As Cox points out, Commissioner Roskelley's statement specifically links Cox's termination to whether he had committed "wrongdoing." Cox argues that this meant that if he was reinstated, he had done nothing wrong, but if he was fired, the implication would be that the County had uncovered "wrongdoing." An allegation of "wrongdoing," while vague, arguably implicates the honesty or morality of the person targeted by the allegation, although the court does not rule on whether it is because such a ruling is unnecessary.

This Court agrees with Defendants that the "wrongdoing" statement does not implicate Cox's liberty interest. First, and most importantly, Commissioner Roskelley did not state that Cox had done anything wrong, only that his employment would turn on the outcome of the investigation. There was no actual charge of wrongdoing leveled in this statement by Commissioner Roskelley.

Second, in order to reach the conclusion urged by Plaintiffs (that Commissioner Roskelley impliedly stated that Cox's termination was the result of "wrongdoing") one would have to combine this September 30, 1998, statement

with the fact of Cox's December 11, 1998, termination. The two-and-a-half-month gap is simply too long to support a finding that Commissioner Roskelley implicated or damaged Cox's reputation for honesty or morality. The statement does not raise a genuine issue of material fact as to whether Commissioner Roskelley deprived Cox of his liberty interest without due process of law.

As there are no other statements attributed to Commissioner Roskelley, and he did not sign the termination letter, the court will enter summary judgment in his favor on the liberty interest claim and dismiss Plaintiffs' claims against him with prejudice.

IV. The Liability of Spokane County

Defendants also ask this court to revisit its holding that Spokane County may be held liable for the actions of its officers. This argument is based on Defendants' contention that Cox has not stated a genuine issue of material fact as to the individual Defendants. As already noted however, the court has not revised its earlier holding that Cox has stated a genuine issue of material fact as to whether Defendants Boxer and Farnell deprived him of his liberty interest without due process of law. Since Boxer and Farnell had the authority to terminate Cox and to write his termination letter, Spokane County may be held liable if it is found that Boxer and Farnell deprived Cox of his liberty interest without due process of law. *See Monell v. Dept. of Social and Health Services of the City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

V. The Issue of Falsity

At the hearing on the motion for reconsideration, there was considerable discussion regarding whether Cox had raised a genuine issue of material fact as to whether the charges made in the termination letter are false. Cox must show that the charges were both stigmatizing *and* false in order to recover. *See Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977). However, Cox's affidavit makes it clear that he denies all of the charges made in connection with his termination. (Ct. Rec. 31.) This is sufficient to raise a genuine issue of material fact about the truth or falsity of the statements.

VI. Conclusion

Defendants' Motion for Reconsideration (Ct. Rec. 49.) is **GRANTED IN PART** and **DENIED IN PART**. Defendants Harris, McCaslin, and Roskelley are entitled to summary judgment, and the claims against them are **DISMISSED WITH PREJUDICE**. Summary judgment is denied as to Defendants Boxer, Farnell, and Spokane County. Defendants' Motion for Certification (Ct. Rec. 49) is **DENIED**.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and provide copies to counsel.

DATED this 15th day of June, 2000.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES
DISTRICT JUDGE